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# PUBLIC POLICY IN PRIVATE INTERNATIONAL LAW

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By private international law we understand the law governing the legal relations between individuals the elements of which affect the laws of more than one state. Which are the principles on which this law is based? Does it form part of the national law of each individual state? Is it based on the sovereignty of the state, or is it paramount to the states? Is it part of the law of nations, so that mutual rights and obligations with regard to it may be assumed on the part of the different states? In an article dealing with public policy in private international law, it is necessary above all to know the author's point of view with regard to this much debated question.

On the one hand there is the opinion of those who deny on principle that private international law is based on the law of nations at all. Before a code of international law can be deemed to exist, they say, it is necessary that the desire of the states to be mutually bound should have appeared unmistakably from their acts and general policy; and it should be possible to point to certain generally acknowledged rules and principles binding the members of the community of states, the violation of which is very generally felt to be a breach of law, and justifying coercive measures on the part of the injured state. Broadly speaking these conditions are non-existent with regard to international private affairs, so that in this respect the family of states does not yet form a legal community. There is no universally acknowledged law in the sense that every state considers itself bound in its legislation and jurisprudence to respect the general interests of mankind even to the detriment of its own. In this sphere every member of the community of states claims absolute sovereignty and the right to delimit independently and solely with a view to its own interests the sphere of its private international legislation. This is a task which naturally belongs to the competency of each state, as it has to extend its organizing and protecting hand not only over the national, but also over the private international relations and conditions, which are connected with it. In this work of organization and protection no legal obligations towards other states prevents a state from placing first its own opinions and requirements, its political, religious and economic interests, the relation with its own purely national legislation, the traditions of national jurisprudence and scholarship and many other factors.<sup>1</sup>

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<sup>1</sup> For full bibliography see Potu, *De la nature juridique du droit des gens dans ses rapports avec le droit international privé* (1913) *Journal de droit international privé*, 482, 483, note.

Now, opposed to the above, is the new doctrine, first formulated about the middle of the nineteenth century by Savigny in his *System of Modern Roman Law*.<sup>2</sup> He assumed with regard to private international law the existence of rights and obligations on the part of states, based on the law of nations itself. In the private sphere also, the civilized nations are deemed by him to constitute a legal community binding its members by certain rules. The development of the community of nations leads to this, that private international affairs must be adjudicated in one and the same way, irrespective of the state where the suit happens to be maintained. This is the fundamental principle of his teaching, which was adopted by the new Italian school led by Mancini,<sup>3</sup> and by him placed on a basis of natural rights. Since then there has been a growing tendency among German and Latin scholars to place private international law on a basis of the law of nations; they take the view that we have here an adjustment of the frontiers between sovereign states, a delimitation of the competencies of different legislations involving the interrelation between states, which cannot, therefore, be determined independently by any one of them, but is subject to laws binding all states. This involves both the obligation and the right to acknowledge each other's sovereign rights in the sphere of private legislation and jurisprudence in the same way as one person is bound to respect the individual liberty of another. There is one law, therefore, one and indivisible, binding all states, from the main principles of which the detailed rules follow with logical necessity, just as in developing a photographic plate the emergence of the boldest and clearest outlines is of necessity followed by the appearance of the finer and fainter ones.<sup>4</sup> International law determines the legal power of every state to grant subjective rights and decides what rights of this kind each state has at its disposal. In this respect also, international law circumscribes the sovereign powers of each state.<sup>5</sup>

Now, one-sided delimitation of sovereignty laid down by any one state in its national legislation can only claim to be respected by the community of states in so far as it is in accord with these higher principles and then only because it embodies these principles. If this is not the case, this one-sided code will indeed be applied in the state that made it, by its legal and administrative organs, because these are bound to obey the national laws, but other states are under no obligation to acknowledge these laws, being contrary to international law.

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<sup>2</sup> 8 Savigny, *System of Modern Roman Law*, 23-27.

<sup>3</sup> P. S. Mancini, professor at Turin, afterwards minister for foreign affairs. See his inaugural lecture delivered at Turin on January 22, 1851, on "Nationality as a basis of International Law" and his report to the Institute of International Law published in (1875) *Revue de droit international*, 329 ff.

<sup>4</sup> 2 Fink, *Die Prinzipien des internationalen Privatrechts und die Vorbehaltsklausel*, *Zeitschrift für Internationales Recht* (1914) 154.

<sup>5</sup> 1 Zitelmann, *Internationales Privatrecht* (1897) 54, 64, 71, 122.

The present writer is of opinion that the former of these views still represents the law as it stands to-day, and therefore places himself in these pages on the standpoint of positive law, which that view involves. In view of the fact that the entire Anglo-Saxon world conceives of private international law as a department of national law;<sup>6</sup> that the German legislator, in drawing up the new civil code emphatically took the position that the individual state may reserve to itself the regulation of private international law and that this matter is by no means withdrawn from its authority as forming part of the law of nations;<sup>7</sup> that the requirements of international intercourse are very different in different countries—compare, for example, countries with much immigration or much visited by foreigners, with countries in which this is not the case; that great differences are to be found in the legislations of different states and upheld and applied by their legal and administrative organs; and that leading authorities on international law disagree on numerous points, even on fundamental principles, he cannot find the liberty to assume the existence in our time of a legal community in the sphere of private international law.

If it be asked whether there are no exceptions to the sovereignty of states as sketched above, we must first of all point to two general, if vague, rules of unwritten law of nations which no state ignores at the present day, in regulating the sphere of private international law. As the state which should ignore these rules would indeed place itself outside the pale of the modern community of states and could, according to the convictions, prevailing in this community, be justly coerced into observing them by war, reprisals or retortion, we have here, indeed, instances of rights and obligations between states.<sup>8</sup> These rules are: (1) that a state cannot with a total disregard of rights acquired abroad, apply to all private international business its own national code, regardless of the nationality and domicile of the parties concerned, the place of the transaction and the whereabouts of the goods; (2) that a state cannot entirely refuse to foreigners the protection of its laws and the rights to trade, merely because they are foreigners, and cannot entirely refuse them the protection of its laws as against its own subjects.

These rules are vague and, as no state denies them, without practical value; they have a purely negative character, as they only describe a situation which the state may not call into being without infringing international law. How far a state can go in the non-recognition of rights acquired abroad and in the restriction of the

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<sup>6</sup> Westlake, *Private International Law* (5th ed. 1912) 1; Dicey, *Digest of the Law of England with Reference to the Conflict of Laws* (2d. ed. 1908) 3; 1 Wharton, *Treatise on the Conflict of Laws* (3d ed. 1905) 2.

<sup>7</sup> 6 *Protokolle der Kommission für die zweite Lesung des Entwurfs des Bürgerlichen Gesetzbuchs* (1897) 2.

<sup>8</sup> See Story, *Commentaries on the Conflict of Laws* (7th ed. 1872) 6 ff.

rights to trade, cannot be ascertained with certainty. So much is certain, that various drastic restrictions of the right to trade and to own property, especially immovable property, have not been considered contrary to international law.<sup>9</sup>

Another and much more important exception to the rule that there exist no rights and obligations between states in the private sphere comes into operation where states have voluntarily relinquished their sovereign rights in this respect, and have arranged these matters by treaty. A legal community has then indeed come into existence. But this is not a subject into which we shall now enter more fully. Suffice it to say that apart from the said exceptions, private international law is based on the sovereignty of the state, and that in our opinion each state has the right by virtue of this sovereignty to apply to private international business: (a) either the rules applying within the state to purely national business; (b) or some foreign law, in some way connected with the business in hand; (c) or independent rules, in such a way that neither the national nor the foreign code is wholly applied to the international business; for example, when for the recognition of a transaction effected abroad its publication within the dominion of the state is required or when a foreigner is required to give security for possible costs, damages and interest, before he can institute legal proceedings.

Not only the rules under (a) and (c) but also those under (b) are the outcome of the sovereignty of the state; for in this case also, the foreign law is applied only because it is the state's will.

Its motive for doing so may, but in our opinion will rarely, be one of comity—in the literal sense of the word—towards the foreign state concerned. The application of the foreign code will generally be the outcome of very different considerations. It will result from a weighing of all the interests involved in the case, from an analysis of its elements, from an inquiry into its character, with the purpose as we shall see, of finding the law which may most fitly and properly be applied to it.

Let us now consider, in connection with these general considerations, the doctrine of public policy, turning in the first place to the writers who deny that private international law is based on the law of nations. Some masters of the old Dutch school already thought, however vaguely, of a public policy. According to Ulricus Huber, the sovereignty of a state involved its absolute power over all goods and persons found even temporarily within its dominions, but the

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<sup>9</sup> Cf. Calif. Gen. Laws, Act 129; Sts. 1913, 206, concerning the rights, privileges, powers and immunities, etc., of foreigners and of certain companies, associations and corporations with regard to immovable property. And similar restrictions for foreigners regarding immovable property and mines exist in Sweden and Norway and in the western frontier districts of Russia. See (Oct. 1916) INTERNATIONAL LAW NOTES, 148; (1905) *Revue de droit International privé*, 812, 903.

*comitas gentium* requires the mitigation of this principle, rights acquired in one state being respected in another with this restriction however: *quatenus nihil potestati aut juri alterius imperantis ejusque civium praejudicetur*.<sup>10</sup> Though not expressed in so many words, a public policy is here as it were anticipated.

We may mention also John Voet, but only on the subject of contracts. He transfers Papinian's rule that contracts between individuals cannot affect public law,<sup>11</sup> to the sphere of international law, so that a foreign law relating to contracts which would in the judge's own country run counter to *eaque publicam respiciunt utilitatem, quo et reducendo quae ad publicam honestatem pertinent quaeque ad actuum solemnitatem ac formam publice stabilitatem*<sup>12</sup> will not be enforced. Possibly under the influence of the old Dutch school we find the same principles in Anglo-American law. By way of restriction and exception to the general rules, which are required by comity and which require the application of the foreign law to international business, "the public policy" of the forum requires the application of the national law as applied to national business, to international affairs also.<sup>13</sup>

Similarly the collision rules requiring the application of foreign law are set aside in almost every continental European state by the requirements of public order and public morals.<sup>14</sup>

The laws of certain American states,<sup>15</sup> as well as those of some European countries, contain express provisions, making reservations in the interest of public order. Thus the Italian law<sup>16</sup> provides that contrary to the general rules of collision obtaining in the kingdom the foreign law may in no case infringe its prohibitive laws nor such laws as affect in any way either public order or public morals. The German legislator expresses himself as follows: The application of a foreign law is inadmissible if its application runs counter to public morals or to the purpose of any German law.<sup>17</sup>

In other states, where a general provision of this kind does not exist, the courts arrive at the same results on the strength of the aim and spirit of the national laws and the national conception of morality.<sup>18</sup>

Turning now with regard to this subject of public policy to the

<sup>10</sup> *Praelectiones juris Romani et hodierni*, Tom. II, Lib. iii, *De conflictu legum diversarum in diversis imperiis*, No. 2.

<sup>11</sup> Digest II, 14, 38.

<sup>12</sup> *Commentarius ad pandectas*, Lib. i, tit. IV, *de statutis*, No. 18.

<sup>13</sup> Cf. Story, *op. cit.*, 281 ff.; 1 Wharton, *op. cit.*, 15 ff.; Westlake, *op. cit.*, 308; Dicey, *op. cit.*, 33 ff.

<sup>14</sup> For bibliography, see 3 Weiss, *Traité théorique et pratique de droit international privé* (1914) 567.

<sup>15</sup> Georgia: Political Code, sec. 9. <sup>16</sup> Civil Code, Prel. Disp. Art. 12.

<sup>17</sup> *Einführungsgesetz zum Bürgerlichen Gesetzbuche*, Art. 30.

<sup>18</sup> France and Belgium: Code Civil, Art. 6; The Netherlands: *Wet houdende algemeene Bepalingen der Wetgeving van het Koninkryk*, Art. 14.

doctrine of those who place themselves with reference to private international law on the law of nations, we find in Savigny's system nothing calling for special remarks.<sup>19</sup>

From his premise that in the private international sphere there exist rights and obligations between states, he concludes that all international legal business involving the laws of more than one country, should be governed by the laws of that country which is naturally entitled to this privilege. The first question to determine is: To which state does the legal transaction naturally belong; where is its "seat"? This standard must be sought in various circumstances in accordance with the nature of the transaction in hand: now in the domicile of the party concerned; now in the situation of the property; at other times in the place where the contract is to be carried out. But the rules thus found are not applied: (1) when the foreign law would clash with laws of a strictly positive and binding nature, which the judge who is trying the cause is forced to apply; (2) when the foreign law involves legal institutions which the judge's country does not acknowledge and to which it cannot therefore extend legal protection.

Here also the part assigned to public policy is, therefore, to set aside in exceptional cases a *priori* collision rules.

An entirely different place is taken by public policy in the system of the new Italian school under Mancini,<sup>20</sup> who, as we know, assumes the existence of rights and obligations on the part of states also in the private sphere. Under the influence of the idea of Italian unity, uniting all nations of Italian race, they adopt nationality as the fundamental law to be applied. A nation's laws—they argue—are determined by various circumstances, such as climate, the nature of the soil, tradition and history. Everyone born into the nation has a part in these laws; he derives from his nationality claims, which follow him everywhere and should everywhere be respected. No foreign legislation may unnecessarily disregard them. His national laws, therefore, should be applied always, unless he voluntarily chooses another law to be applied to his case, or when his case is one affecting the sovereignty of the foreign state, as expressed in laws affecting its economic prosperity or reflecting its political and social principles, or the prevailing *mores* of the state. In this system, therefore, three principles are involved: (1) the principle of nationality; (2) the principle of the autonomy (right of self-determination) of the parties; and (3) the principle of sovereignty. And the last named reveals itself in the rules of public policy, to which, therefore, is not assigned the part which we have hitherto met with, viz., to set aside in exceptional cases the established collision rules, but is here one of the pillars on which the system of collision rules rests. When in this

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<sup>19</sup> 8 Savigny, *op. cit.*, 33 ff.

<sup>20</sup> See note 3, *supra*.

system nationality and sovereignty clash—which happens very occasionally, for example, when the national law of the parties admits of polygamy, but the law of the judge's country does not,—sovereignty carries the day. Again, therefore, it is the function of public policy to set aside the general collision rules. Italian, French and Belgian scholars have sided with Mancini and have developed his views, often in an independent way. It is therefore possible to speak of the system of the Latin school.<sup>21</sup>

The judge who has to apply the law of his own country, the scholar whose sole object is to investigate and describe the law of the state to which he belongs, must apply in the first place, with regard to questions of public policy, the rules laid down in the legislation and formed by the jurisprudence of the state in question. If no such provisions exist, they may neither formulate nor apply other rules, than such as fit in with the existing law, applicable within the state to national and international transactions. The first question to be asked in this connection is therefore: Are these rules in the state established by the legislature or by the courts, which by virtue of their explicit contents, purpose and tendency with regard to the interests to be protected by them, exclude the application of foreign law with respect to international transactions, because they involve public policy? On the other hand Savigny's theory and the Latin school invite us to look upon the question of the conflict of laws not only from the point of view of one definite state, but to consider it from a broader and more scientific standpoint. We have already laid stress on our opinion that, in general, rights and obligations between states do not exist in the private sphere and that the sovereignty of the state is in this respect still practically absolute. In this respect, therefore, we disagree with the said school. There is, however, another question independent of the one, who has authority over the rules of private international law. It is this: Which rules are from a general point of view the best and the most useful for private international intercourse? How are the various interests involved in international questions met in the fairest and most efficacious manner? This is an inquiry which, it may be mentioned in passing, may be pursued with advantage in many cases, even by practical students of law, considering the paucity of rules to be found in the legislation of most states. When one asks this question and considers that the elements of an international question connect it with more than one state, one perceives that not only the interests of individuals, but also those of states are involved, so that it is necessary to decide in each case, which of the interests involved ought to preponderate, and on the ground of this interest the law to be applied must be determined. Whenever the public policy of a state is involved the interests of the

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<sup>21</sup> See note 14, *supra*.



state are decisive—whether or no the balancing of the personal interests would lead to the same conclusion, for public policy represents the highest of all the interests involved, to which all others must give way.

Two cases are now possible: First, the states, whose laws are involved in the international transaction, are agreed on the question of public policy. Suppose for instance that a Dutch bank is to furnish a mortgage in the state of Washington on the immovable property of an Italian; only the public policy of Washington is involved, not that of Holland or Italy, which do not oppose the application of the law of Washington.

But another case is also possible, that of disagreement leading to a different adjudication in each of the different states. This is the case, when in more than one of these states public policy demands the application of the national law. This is strikingly illustrated by the text and the history of the Hague treaties concerning private international law, more especially by the treaty concluded on the 2d of June, 1902, between different European states for the regulation of legal conflicts with respect to marriage. To give one example out of many: According to the treaty, the "right" to marry is, as a rule, subject to the national law of both contracting parties. But if this law contains an obstacle to the marriage of a religious nature, this by no means prevents the legal celebration of the marriage in the signatory states, where such an obstacle, which would be contrary to public policy, does not exist and is not acknowledged. Is the marriage contracted under these circumstances, it is void in the native country of the parties, valid in the place of celebration, whilst the other signatory states have a right to consider the marriage void?<sup>22</sup>

This shows that where public policy is involved, even mutual deliberation and an accommodating spirit on the part of the states concerned, cannot always lead to the uniform adjudication of international questions in all states.

We should like to make another observation, closely connected with what precedes. By way of introduction we may mention a thought of Savigny,<sup>23</sup> afterwards adopted and elaborated by the Swiss professor Brocher.<sup>24</sup> He says:

"Legal rules, which do not affect public policy and public morals in the purely national legal sphere of the state and which, therefore, have no compulsory character, so that they can be deviated from in an individual agreement, also lack compulsory character in the international sphere and therefore never constitute a bar to the application of a foreign law. But the reverse is by no means the case. Rules

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<sup>22</sup> Article 1 and 3 of the treaty may be found in the *Bulletin des Conférences de la Haye* (1909) 22.

<sup>23</sup> 8 Savigny, *op. cit.*, 34.

<sup>24</sup> Brocher, *Cours de droit international privé* (1882) 108.

affecting public policy and public morals in the national legal sphere, need not have the same character in the international sphere and need not necessarily form a bar to the application of a foreign law to the case under consideration. The institution of guardianship over infants, for instance, affects public policy in the purely national sphere; deviation from it by agreement is not possible. But in the international sphere the law applied in practically all European countries is that of the infant's domicile (or nationality)—at least where questions of procedure are not concerned. The same applies to the question, whether a child must be considered as legitimate or illegitimate, whether the legitimization of natural children by the subsequent marriage of the parents is allowed, etc. Consequently national and international public policy, '*l'ordre public interne*' and '*l'ordre public international*,' are as a rule strictly distinguishable."

In considering now the different effects of these two kinds of public policy, we shall come to conclusions, somewhat different from those reached by the foregoing authors and even differing somewhat from the general conception of the part played by public policy in private international law. In the national sphere public policy opposes individual acts, which are not consistent with the compelling rule; in the international sphere it opposes not so much these acts themselves as the application of a foreign law to these acts; here its function is to ensure to the national law authority over those acts and it consequently creates a collision rule. This conclusion at once leads us to the following question: Is not the public policy of the state involved in every compelling rule of collision, according to which in a certain international case the application of the foreign law is excluded for the benefit of the national law? The answer is in the affirmative. Public policy indeed plays a much more important part in private international law than is generally ascribed to it in the generally accepted classical theory, which only assigns to it the effect of setting aside prevailing collision rules in exceptional cases. For public order forms the basis of all collision rules, in which the authority of the national and the foreign law is strictly delimited at the expense of the latter. Public policy sometimes requires that the sphere of activity of the national law shall be absolutely territorial, so that all acts of a certain kind performed within the territory of the state, independent of domicile and nationality of the persons concerned, shall be governed by its law. At other times public policy does not require this, but involves extra-territorial powers of the national law; so that foreigners in the country are not subject to the national law, but subjects of the country resident abroad are. Already in the eighteenth century Bouhier<sup>25</sup> pointed out that it is these considerations of public policy which cause the rules of family law to follow the subjects of a country

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<sup>25</sup> Bouhier, *Observations sur la coutume du duché de Bourgogne*, chs. 27, 28; see also Kahn, *Abhandlungen aus dem internationalen Privatrecht*, *Jhering's Jahrbücher* (1898) 99, 100.

abroad, it being impossible to allow authority to foreign laws with regard to this matter. This is realized more clearly by Anglo-American judges and authors than by the writers of the new Latin school.<sup>26</sup> For example, it is by virtue of public policy that some southern states in the United States prohibit the recognition of mixed marriages contracted between blacks and whites, there domiciled, in another country, where the said impediment does not exist.<sup>27</sup>

In case of a conflict between the compulsory collision rules of two states—one for instance referring the case to the *lex domicilii*, the other to the *lex loci actus*—there is at bottom a conflict between the public policies of the two countries. In connection with these considerations the operation of the collision rules within a state may be as follows: (a) It is absolutely territorial, when the national law claims authority only over acts performed within the territory of the state, but within this sphere admits of no exception, regardless of the domicil and the nationality of the individuals concerned; for example, the rules of property, of procedure, etc.; (b) it is absolutely territorial and at the same time absolutely extra-territorial, when the national law claims authority over acts performed either within or without the country and regardless of their having been performed by persons domiciled at home or abroad, nationals or non-nationals. Laws prohibiting polygamy, slavery or imposing the total loss of civil rights (civil death, monks, nuns, etc.) have this effect in many states; (c) it is absolutely territorial and at the same time relatively extra-territorial, when the home law embraces in the first place all acts done within the country, regardless of the persons doing them being subjects or foreigners, and at the same time all acts done abroad in so far as they have been done by subjects of the state.

We allude to those cases in which a state declares its own national laws in certain respects applicable also to its subjects abroad, but with a view to public policy subjects foreigners residing within the state not to their national law, but to its own laws; cases, therefore, in which the state is not consistent. According to a very general legal opinion, and explicitly embodied in German law,<sup>28</sup> the provisions concerning capacity are applied in this manner: that where acts performed within the territory of the state are concerned, they are not only binding upon its own subjects, but also on foreigners if the local law confers a greater measure of capacity, for example, if the person concerned is not yet of age according to the foreign law, but is of age according to the judge's law. And this is done notwithstanding the fact that the said provisions of the national law also protect the subjects of the state abroad. (d) It is relatively territorial, at the

<sup>26</sup> Dicey, *op. cit.*, 33 ff. Here, at least, extraterritorial statutes and public policy are put on an equal footing.

<sup>27</sup> I Wharton, *op. cit.*, 346-348, 362.

<sup>28</sup> *Einführungsgesetz zum Bürgerlichen Gesetzbuche*, Art. 7.

same time relatively extra-territorial, where rules are concerned, which only bind subjects, both at home and abroad. Such are in most European states the provisions concerning the family name, the status of legitimate or illegitimate children, the guardianship of infants, etc.

In considering the effect of public policy on the collision rules, we must also remember that in every state two situations are possible.<sup>29</sup> In the first place, the provisions of the national law may be such as to exclude all influence of any foreign law over the international question. Public policy here gives the general collision rule, so that in a case of this kind the national code only governs, independent of the provisions of the foreign law and regardless of the difference between it and the national law. Divorce, for example, is granted in Holland exclusively according to the national law, regardless of the law of the state to which the foreign parties concerned belong.

But the case may also be different. The general collision rules of the state may leave the decision of the affair to the foreign law, but the provisions of some special foreign law may be so far opposed to the national law that this particular law cannot be applied in the state. In such a case the special provisions of the foreign law call into operation the hitherto dormant collision rule, by virtue of which the national law, the *lex fori*, is by way of exception declared applicable. As examples of this case, in which we can speak of an absence of international community<sup>30</sup> we may instance the provisions of the Russian and Austrian legislations, prohibiting the marriage of a Catholic with a non-Christian, and the prohibition of mixed marriages between blacks and whites in some southern states of the United States. Or, to take an example from commercial law: A mortgage of a foreign ship executed abroad is generally held to be valid in Germany, if the foreign law has been complied with as regards formalities. But though the mortgage is executed according to the said foreign law, if, unlike the German legislation, the latter does not guarantee sufficient publicity of the mortgage as regards third parties and the mortgage is not entered upon public registers or made public in some other way, the otherwise applicable general rule is set aside, and the national law, the *lex fori*, is applied.

The operation of the rules of public policy may be prohibitive (prohibition of slavery, non-recognition of the loss of all civil rights as a punishment) and imperative or concessive (the duty of assisting persons in peril of their lives, qualifications for marrying, independent of religious or political objections or of differences in social status, etc.). Though we are inclined at first sight to think in the first of these cases only of a negative operation of public order, viz., the

<sup>29</sup> Fink, *op. cit.*, 172 ff.; Kollewyn, *Het Beginsel der openbaare orde in het internationaal privaatrecht* (1917) 30, 31.

<sup>30</sup> Bartin, *Les dispositions d'ordre public, la théorie de la fraude à la loi et l'idée de communauté internationale* (1897) 29 *Revue de droit international* 385, 613.

non-application of the foreign law, it is in reality replaced by the positive provisions of the national law—in our example by those relating to personal liberty and capacity. Regarding the imperative and concessive rules, it may be pointed out that they resist only the application of prohibitions in the foreign law, which are incompatible with them, but not prohibitive provisions of this law in other respects, applicable to the proposed transaction. For instance, though the marriage of a Russian Catholic with a non-Christian would have to be allowed in Holland as regards public policy, in spite of the ecclesiastical marriage-prohibition of the Russian law—yet if there is another impediment to the marriage according to Russian law, to which our public policy is not opposed—for instance that the woman at the time of the marriage was already eighty years old or had been married three times previously—this remains an impediment to the marriage and prevents its celebration.<sup>81</sup>

As to the operation of the rules of public order on acts performed abroad, we must particularly observe that they generally render these acts void, though they are valid according to the foreign law, but that the reverse is also quite possible. We may instance the will of a slave or person who has lost all civil rights, void in the country of the testator but valid in our country.

Let us now look more closely at the cases in which public policy makes its influence felt. It is impossible to give an enumeration of the legal rules of public policy; to classify them is difficult and not worth while. Sometimes they occur as the outcome of a general state of culture, proper to the Christian world as opposed to nations of a lower or different civilization—the prohibition of slavery and other forms of personal servitude, prohibition of polygamy, etc.—; at other times they are concerned with demands, which distinguish the moral or legal order of a state from that of others and which are connected with its political, economic, religious or ethical organization. We may instance ecclesiastical and civil marriage and in connection with it divorce and separation; landed property and public credit, protection of life and property against illegal attack, the fighting of drink and gambling, smuggling, etc.

These few examples prove already that the rules of public policy cannot by any means be identified with those of public law, because they cover a much wider field. Thus every state has its own public policy and we must not lose sight of the possibility that in one state more importance is attached to a rule than in another, so that in the one state it forms part of public policy, in the other it does not. It is also possible that a certain matter belongs to public policy in both countries, but that it leads in each of these states to a different collision rule. Thus in countries with a civil marriage law public policy

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<sup>81</sup> Niemeyer, *Das internationale Privatrecht des Bürgerlichen Gesetzbuches*, 94.

requires that all marriages celebrated within their territories—also marriages between foreigners—shall be concluded according to the national law, but does not require this form in the case of marriages of nationals concluded abroad; whereas in countries with an ecclesiastical marriage law the usual rites need not necessarily be compulsory for non-conformists, but are generally compulsory, on pain of invalidity, for nationals belonging to the state church, marrying abroad.

The foundation of a rule may change likewise in the course of time, in such a way that it loses its original character of public policy, or *vice versa*; or else the character of public policy belonging to it may require other things at one time than at another. Take, for example, the prohibition existing in some countries to take more than a certain maximum percentage on money-loans. Where this prohibition now exists, it is connected with the present economic conditions in some definite country and does not generally affect contracts made and to be carried out in a foreign state, which therefore are not connected with the economic conditions of the home country. But the usury laws of former centuries, derived from the Roman Catholic church prohibiting the taking of interest on money-loans, were universal in their tendency and were intended to apply to foreign relations also, to all Christendom in fact.

In connection with our subject the acts of human beings may be divided into two groups. In the first place there are those which had an international character from the very beginning, because their elements are with more than one state; for example the purchase made in one country by subjects of another state, of landed property situated in a third state. But there is, besides, a group of relations and conditions which originally belong to the national legal sphere of a single state and which only acquire an international character, through subsequent circumstances, for example, through a change of domicile by one of the parties or the removal of the property which formed the object of the act to a foreign country.

Public policy can make its influence felt on both kinds of legal relations. We must not forget, however, that whether in a certain case public policy is involved, whether it is possible to point to a sufficient interest on the part of the judge's country, which requires application of the national law and resists that of the foreign one, will as a rule depend on the closeness and intimacy of the connection between the question under consideration and the state of the judge, in other words, on the question whether the transaction contains elements of sufficient importance forming points of contact with the laws of that state. General rules as to when this is the case, and how the elements of the case must be grouped, to involve public policy in the judge's country, cannot be given. We can only say that the elements connecting the case with the judge's country will display

the required importance and interest sooner in the case of acts whose elements connected them with that state from the start—for example, because the act was performed within the territory of the state, or was undertaken by subjects of that state—than in the case of relations and conditions, which have come into being in a foreign country and having there only a purely national character, have become connected with the judge's country through subsequent internationalizing elements. However even what has been said here cannot by any means be applied absolutely and without exceptions. Every case must be considered separately.<sup>32</sup> Similarly a divorce between foreigners can only be pronounced in many states if based on the laws of these states, independent of the provisions of the national laws of the parties, whereas these states recognize without difficulty a divorce between foreigners, pronounced in a foreign country, according to the foreign law.

Such is the prevailing legal condition in Holland. Only the different grouping of the points of connection, which in the one case connect the case so much more closely with the state concerned, than in the other, is the cause of these various appreciations of the question, whether public policy is involved or not.

It will be now evident how great is the importance of the elements of the case with regard to the subject of public policy. But we must be careful not to exaggerate this importance and to represent it as if the solution of the whole question of public policy may be found in these points of connection.<sup>33</sup> The provisions of the foreign law undoubtedly turn the scale in many cases, independent of the points of connection, though we must always remember, that at bottom it is not the question whether the provisions of the foreign law in themselves, but whether the *application* of these provisions by the organs of the state is to be considered consistent with public policy.

We need only call to mind what was said above of a case governed according to the general collision rule of a state by foreign law, which was set aside, however, on grounds of public policy because the pro-

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<sup>32</sup> Some examples may illustrate this. In a certain state the marriage between uncle and niece is regarded as incest and is strictly prohibited. If foreigners, subjects of a state that permits such a marriage, desire to marry in this state, the elements of the case are grouped in such a way, they are founded on such an important point in the state, where the prohibition prevails, that the latter cannot permit the marriage, and if contracted there in spite of the prohibition, it will be regarded as void; whereas there need be no objection to acknowledging its validity, if the connection with the state, where the prohibition prevails, be less close, for instance, if acknowledgment be there requested of a marriage, contracted abroad, between a foreign uncle and niece, legally contracted in the native country of the parties. A different decision was given in *United States ex. rel. Devine v. Rodgers* (1901, E. D. Pa.) 109 Fed. 886. For a criticism of this case see Wharton, *op. cit.*, 328, note 5.

<sup>33</sup> See Fink, *op. cit.*, 141; Niemeyer, *op. cit.*, 100.

visions of some definite law were so directly contrary to the national law. Though the points of connection may, therefore, be exactly the same, public policy will exert its influence in the one case and not in the other, according to the provisions of the foreign law involved. Or to take another case. It is possible that a foreign institution is unknown in the state and is not allowed there. Slavery has been abolished in all Western civilized states and a claim for the delivery of slaves purchased in a slave-market could certainly not be entertained there. But acts legally done by the slave for his master in a state where slavery exists, may without objection be entertained by our courts and their fulfilment ordered by our judges. Yet, in both cases the points connecting the transaction with the judge's state are exactly the same and the provisions of the foreign law are decisive.<sup>34</sup> This is the general method of solving the conflict of laws: Of the laws applicable to an international transaction, one—sometimes more than one—is chosen in the sense that the national laws of one or more of the states involved, which are there applied to national relations and conditions, is applied to the international case.

This method is likely to give in most cases the best and fairest solution, but this is not always the case.<sup>35</sup> Restricting ourselves here to the cases in which public policy is involved, we can reduce them to definite groups.

Public policy does not require that the *lex fori* be exclusively applied, the public morality in the state of trial being satisfied, if it is applied in part, less thoroughly than in the national sphere. The public policy of the state of trial could not allow the foreign law to govern exclusively, but neither does it require the application of the court's law to its full extent; so that there is occasion for the judge to create an independent rule of private international law, not based purely on either of the laws involved.

For example: English law does not recognize the obligation of mutual support between parents-in-law and sons and daughters-in-law; French legislation does, the allowance being fixed according to the wants of the persons claiming it, and the income of the person bound to support him.<sup>36</sup> The French judge considers public policy involved in the matter, and in a law-suit between English people applies the French law in all respects, also with regard to the amount.<sup>37</sup>

<sup>34</sup> Von Bar, *Theorie und Praxis des internationalen Privatrechts* (2d ed. 1889) 128-130; Story, *op. cit.*, 124.

<sup>35</sup> See Jitta, *Internationaal Privaatrecht* (1916) 74; Kusters, *Het internationaal burgerlijk Recht in Nederland* (1917) 61. In connection with public order, see Kollwijn, *Het Beginsel der openbaare orde in het internationaal Privaatrecht* (1917) 72.

<sup>36</sup> Code civil, Arts. 206-208.

<sup>37</sup> 1 Aubry et Rau, *Cours de droit civil français*, 133; 1 Demolombe, *Cours de code civil*, 36; (1903) *Journal de droit international privé*, 599; (1904) *ibid.*, 356; (1914) *ibid.*, 626.



But we might ask: Did public policy indeed require in this case, which was between foreigners in whose country no such obligation of support exists, to assume its existence to exactly the same extent as in that of natives? We agree with those who think,<sup>38</sup> that with regard to foreigners the moral requirements of the *lex fori* are satisfied, when proper support is furnished, so that such support would be sufficient as would relieve the most pressing needs of the applicant, regardless of the circumstance that the defendant's income would enable him to make a larger allowance. In reaching this conclusion, an independent rule of private international law is given, not found either in English or in French law.

A second group, in which in connection with public policy room is left for the formation of independent rules of private international law, consists of those cases, in which public policy requires the application of the *lex fori*, but where the exclusive application of that law would have such unjust and unnecessarily hard consequences, that its application in that way cannot be allowed and an independent rule of private international law, hitherto unknown in the national legislation, must be given instead. In the Netherlands many cases of this kind have occurred, of which a few examples are herewith given. A British merchant vessel, mortgaged in England, comes to Holland and is there seized and sold for debts, incurred by the British owner in connection with the voyage. Public policy in Holland requires that the order of priority in which the proceeds of the sale are applied to the debts owed by the vessel, shall be determined by Dutch law. But now it appears that there are conventional mortgages on the foreign ship, which by no means agree with those known to the law of the place of sale, as is the case with English mortgages. A strict application of the law, required by public policy, would involve, that such mortgages which are unknown to Dutch law could claim no priority with regard to the proceeds of the ship. But this application of the purely national law, to a transaction effected abroad, according to the requirements of the law there prevailing, would have in this case unbearably harsh and unjust consequences and therefore the judge creates for this case an independent rule of private international law, hitherto not known to Dutch law, according to which conventional foreign mortgages on ships rank with Dutch mortgages, provided they are equivalent to these in all essentials, and so English mortgages rank with ours, though with regard to legal consequences there is a marked difference between the two on many points.<sup>39</sup>

Another case: Dutch law distinguishes between two kinds of deeds: *a.* authenticated deeds, duly drawn up by or in the presence of qualified

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<sup>38</sup> Kollwryn, *op. cit.*, 47.

<sup>39</sup> Court of justice, Rotterdam, January 3, 1913, *Weekblad van het Recht*, No. 9525; Court of appeal, the Hague, December 24, 1915. *Weekblad van het Recht*, No. 9908.

public officers, which deeds have the legal presumption of authenticity in their favor, and *b.* private deeds, which do not satisfy these requirements and whose force of evidence is therefore less conclusive.

With regard to foreign deeds the rule is, that they are regarded as authenticated, if they have the character of authenticated deeds in the country to which they belong, according to the law prevailing there. Our legislation now contains a number of provisions, which, as they involve formal law, are of public order, by virtue of which an authenticated deed is required in this country for certain legal acts. To mention only one: in a law-suit the oath must be taken personally, but for special reasons one of the parties may be permitted to have the oath taken by a person, authorized thereto by an authenticated deed.<sup>40</sup> Now when a party submits a warrant of attorney drawn up in a country where authenticated deeds are not known, strict application of the national law would lead to a declaration of insufficiency of the warrant of attorney and a refusal to admit the person authorized therein to the oath. Our courts, however, take a milder and more reasonable view. The question asked is: Does the deed satisfy the requirements in the country where it was drawn up, of a deed agreeing in the main as to character and force, with the authenticated deed of Dutch law? When the answer is in the affirmative, the deed is put on a level with an authenticated deed and is held to be sufficient for the purpose described, which is for instance the case with the affidavits known to Anglo-American law.<sup>41</sup> Here again an independent rule of private international law is given which so far unknown to national law is called into existence in connection with the provisions of the foreign law involved.

A third group of cases, in which the formation of independent rules of private international law in connection with public policy may, in our opinion, be necessary, occurs in connection with immoral circumvention of the law, because rules are required to protect a third party against the invalidity of an act, undertaken *in fraudem legis*. Suppose a limited company is formed in a state according to the law there prevailing, only to evade the law in another state with regard to such a company. In reality the domicile of the limited company is in the latter state; it is managed from thence, the centre of its activities is there. The state, whose law has been circumvented, will not, under these circumstances, consider the formation of the limited company valid and consequently declares contracts made within its territory to be void, with this restriction; however, that a third party, who believed in good faith that he was dealing with a legally established limited company, must be indemnified against the damages arising from the invalidity of the contract.

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<sup>40</sup> *Burgerlijk Wetboek*, Art. 1982.

<sup>41</sup> Court of justice, Amsterdam, March 1, 1889, *Weekblad voor het Recht*, No. 5694.

A similar condition exists when subjects of a state, solely with the object of evading its law, contract a marriage in a foreign country. The former state will declare the marriage void, but third parties, who, relying in good faith on the validity of the marriage certificate, made a contract with the supposed husband and wife on their return to their native country must be protected. In this and similar cases, therefore, the judge must make independent rules, especially applicable to the case in point and which would not have been made if the law of the state, the legislation of which has been evaded, or the other law in question, had been applied in all respects.

Public policy still requires to be separately considered in its relation to contracts because it must here be adapted to the right of self determination of the parties—which is of such great importance in this matter.

Contracts whose elements connect them with the laws of more than one state must be divided into two groups:

(1) Those in which the parties have explicitly stated their intentions as to the law which is to govern the contract, or where their intention in this regard, though not expressed, may be inferred from the circumstances of the special case. Such circumstances are: Expressions used in the contract, which are or are not connected with certain national or international legal conditions; the language in which the contract has been drawn up, the coinage, in which, according to it, payment must be made; the way in which parties have on former occasions made similar contracts, and considered and observed rights and obligations arising from the same; the way in which the parties carried out the contract in the case now pending, etc. A subjective standard, therefore, is here applied to determine which law is to govern.

(2) In the second place we have those contracts, in which it is impossible to point out either an explicit or an implied agreement of the parties as to the law governing the contract. We must here discover which law the parties would presumably have declared applicable, if they had considered the point. The criterion must be the intention of reasonable, normal people in similar circumstances, the supposed normal intention of the parties in international relations. To find this we must consider the character of the contract, and inquire which of the elements connecting it with the laws of the states concerned, are decisive. This leads us to declare applicable the law of the state, where the contract was made or where it must be carried out; or that of the country, to which all the parties belong or where the debtor is domiciled, while in certain special agreements special elements are allowed to predominate. Further treatment of this subject lies outside the scope of this article. Whichever law is declared applicable, however, we can say, that in all these cases an intention of the parties

is only assumed but has not actually been proved to exist; an objective criterion, therefore, determines the law which is to govern.

It is always difficult to give general rules in the matter of international contracts; and so we readily admit that the line of demarcation between the two groups is often difficult to draw and may be made in different ways. Nor do we forget that the case may sometimes be such, that the circumstances of the special, concrete case are only decisive in connection and in coöperation with some objective criterion. But this does not affect the distinction made, any more than the difference between public and private law can be doubted because of similar objections.

Now if we consider these matters in the light of public policy, we come to the following conclusion:

In cases in which the explicit or implicit intention of the parties as to the law which is to govern, is apparent from the circumstances of the case, even though only in connection with some objective criterion, the following question must be asked: Does the law, thus pointed out, recognize the autonomy of the will of the parties? If so, the contract is valid and to be recognized as such everywhere, except in case of conflict with the public policy of the *lex fori*.

But if the said law nullifies the agreement on the ground of public policy, if this law does not accord to the parties the right to make the agreement they have made, the invalidity of the agreement must be accepted not only in the state whose law governs, but also in other countries. A contrary solution, on the plea that the parties have placed the contract under another of the laws involved, according to which it would be valid, cannot then be admitted, as contrary to what has appeared about the real, though ineffectual intention of the parties. It is true, if the parties had known the provisions of both laws, they might have chosen the one which would have made their contract valid, but this hypothesis is not sufficient, as opposed to the actual, apparent intention of the parties. The above applies not only in case of absolute, but also in case of partial invalidity of the contract.

Turning now to the case in which the subjective criterion is wanting with regard to the governing law and only the objective one can be applied, we must discover the law with which the agreement is most closely connected by virtue of its nature and of its elements, with which it has in this respect the most important points of contact.

We cannot determine here what law this is, in general or in any special class of contracts; let us here assume that it is the law of the country where the contract was made, the *lex loci contractus*. This law is now decisive as regards the validity of the contract. Must we not modify our conclusion, however, if this law should make the contract void? Does not the assumed normal intention of the parties in international relations compel us to hold that if the contract is valid according to another law with which it is connected such law

should govern? Although the law of the country where the contract was made, is in general the proper law to be applied, would not normal intelligent people prefer to contract with reference to the law of the state which will maintain the agreement?

We answer in the negative. In this way the recognition of the validity of the contract may be achieved in a state with which it is related through some of its elements, but this does not alter the fact that the contract is and remains void in the state with which its most important elements are related. The case is thus adjudicated differently in the different states concerned. This is so abnormal and unnatural, that it cannot be assumed to agree with the supposed reasonable intention of the parties in international intercourse. These considerations apply not only in case of absolute, but also in case of partial nullity of the contract. In the latter case the normal intention of the parties would certainly be opposed to the splitting up of the agreement in such a way that it would be partly governed by one law, and partly by another.

In conclusion we come to the question, whether the judge has to take into account the public policy prevailing in a foreign state.

We must here distinguish different cases.

There is little doubt, when, according to the collision rules of the judge's country, the foreign law governs the act in question. Public policy then exerts its full influence, in accordance with this law, in so far as it does not come into conflict with the public policy of the judge's country.

There is more doubt in the case of a second group of cases, namely those in which, according to the collision rules of the judge's country, the national law governs the act. As a general rule we may now assume with certainty, that in the said state the act will not be declared void, simply because it is contrary to the public order of a foreign country and would not be recognized as valid there. But the case may be, that though no material interests of the state or society of the judge's country are injured by the act, yet the requirements of morality prevailing there, are opposed to the acknowledgment of the validity of the act, because the social or political interests of a foreign state have been injured in a reprehensible way. This is possible in the case of acts, which cannot stand the test of public morals as prevailing in Western civilized countries irrespective of the place of performance or of the persons injured by them. Smuggling agreements to defraud a foreign country,—agreements for the payment of money for bribing the officials of a foreign state, are by their nature immoral and must therefore be declared void in times of peace in every civilized state, whose laws reject immoral acts.<sup>42</sup>

We consider acts circumventing foreign laws in an immoral way as void because contrary to public morals, even if the parties interested

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<sup>42</sup> Lotmar, *Der unmoralische Vertrag* (1896) 69, 78, 79, 176, note 206; Story, *op. cit.*, 288 ff.

have contracted with reference to the laws of the state to which the judge belongs, for these laws do not extend their protection over immoral acts.<sup>43</sup> In this way, moreover, the great advantage is obtained of a uniform decision of the matter in the different states concerned.

The extent to which the rights of a *bona fide* third party are to be respected in these cases, depends upon the *lex fori*. Thus, according to Dutch law, a contract for the insurance of goods to be smuggled to the detriment of a foreign state, would be void, but the insurer, who is not to blame, would not lose his claim to the premium.<sup>44</sup>

A last category of cases, involving the applicability of foreign public policy, is the following: The elements of the case are grouped in such a way, that no encroachment is made on the public policy of the judge's country: two mutually incompatible laws of public order of two foreign states, however, are involved in the matter. Now, is the judge simply to apply that foreign law, to which the collision rules of his own law give jurisdiction over the matter, or must he to some extent take into account the public policy of both the foreign states concerned? For instance, Spanish law does not recognize divorce so far as its subjects belonging to the Roman Catholic church are concerned. Now suppose a Spanish couple has been divorced in a North American state the law of public order there prevailing allowing the divorce. What attitude with reference to such a divorce should be taken by the courts of states, such as the Netherlands, France, Belgium, etc., where the personal status of a foreigner is determined according to his national law?

We can argue on the one hand that the judge has only to protect and to uphold the public policy of his own country and where that is not involved to adjudicate international affairs, according to the laws to which his own collision rules refer him. In our example, the public policy of the judge's country was not affected by the divorce, pronounced in a foreign country and not relating to subjects of its own. The judge would have to apply, therefore, the collision rule of his own legislation, which referred him to the national law of the parties, according to which the divorce was void. He would therefore have to apply the said law and pronounce the divorce void.<sup>45</sup>

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<sup>43</sup> Bartin, *Les dispositions d'ordre public, la théorie de la fraude à la loi et l'idée de communauté internationale* (1897) *Revue de droit international*, 647; (1912) *ibid.*, 578, 580, 581.

<sup>44</sup> *Wetboek van Koophandel*, Art. 282.

<sup>45</sup> This is the opinion in France and Belgium. Court of justice, Lille (1<sup>re</sup> chambre) May 21, 1908. (1909) *Journal de droit international privé*, 198; note Perroud; Court of justice, Sein (2<sup>e</sup> chambre) July 30, 1912, (1913) *Journal Clunet*, 594, 595; Court of justice, Antwerp (1<sup>re</sup> chambre) March 9, 1911, (1912) *Journal Clunet*, 578 and note J. P.; J. P. sub Court Lyons (3<sup>d</sup> chambre) November 25, 1913, (1914) *Journal Clunet*, 1230, 1234, Bartin, *Les dispositions nationale* (1897) *Revue de droit international*, 645 ff.

We prefer to take a different point of view, and make the decision depend on the answer to this question: whether the act, if performed in the judge's own country, would have been in accordance with or contrary to public order? In the former case it may be recognized as valid in the judge's own country; in the latter case not. For although the public policy of his country does not apply in such cases, it may be granted so much influence as to set aside the collision rules there existing, with the result that a foreign law is applied, the public policy of which agrees entirely or in the main with the national law. In our example the rules of public policy on divorce in the judge's country—Holland, France, Belgium, etc.—agree with those of the state where the divorce was pronounced (the North American state), and not with those of the state to which the parties belong (Spain). The judge, therefore, setting aside the collision rule, according to which the divorce depends on the national law of the parties, can recognize the divorce as valid.<sup>46</sup>

We must not forget that in our argument the public policy of the judge's own country, which, when it requires application, constitutes the dominant factor, does not directly bring about the decision, so that other interests involved in the matter can also be taken into consideration. Thus in our example, the circumstance that the act was valid in the place where it was done, may also be allowed weight, so that the principle may be applied, that acts, valid according to the *lex loci* must, whenever possible, be recognized as valid in other countries. Thus justice may be done to all personal interests depending on the validity of the act. Think for instance of a second marriage of the divorced husband or wife and the children born of that marriage. There is all the more reason for the judge to apply that one of the two foreign laws, whose public policy agrees more nearly with his own, when there are circumstances which connect the case with his own state, for instance when the new husband or wife of one of the parties and the children of that second marriage are subjects of the judge's state. However we must not confuse these personal interests of subjects of the judge's state with interests of public policy of his native country. This policy, however, as we have seen, is not directly concerned in the matter.

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<sup>46</sup> The judge of a state where the Roman Catholic church predominates, for example in some South American republics, would probably decide differently on the ground of the direct applicability of public order in his own country.